No. 449

E. W. CLARK,
As Receiver, Petitioner,

-vs-

HARRY O. WILLIARD, W. W. WHEATON,
C. W. HAY, as Trustees of Gordon Campbell-Kevin
Syndicate, a Common-Law Trust, and
CAMPBELL-KEVIN SYNDICATE, a
Law Trust,
Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

LOUIS P. DONOVAN
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Shelby, Montana.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 449

E. W. CLARK,

As Receiver, Petitioner,

-vs-

HARRY O. WILLIARD, W. W. WHEATON, and C. W. HAY, as Trustees of Gordon Campbell-Kevin Syndicate, a Common-Law Trust, and GORDON CAMPBELL-KEVIN SYNDICATE, a Common-Law Trust,

Respondents.

STATEMENT

The Montana statutory provisions and Montana constitution as interpreted by the Supreme Court of Montana in this case (Record 69 to 77) continued the Federal Surety Company, an Iowa corporation, in existence for the purpose of being sued in the Montana courts by Montana creditors, notwithstanding its dissolution in the state of its domicile. Petitioner now challenges the validity of these statutory and constitutional provisions in Montana upon the ground that they in effect deny "full faith and credit" to the judgment rendered by the Iowa court dissolving the cor-

poration and to the Iowa statute providing for su
dissolution. In our opinion the case is ruled by and t
validity of the Montana statutory and constitution
provisions is upheld by the decision of this court
McGoon vs. Scales, 9 Wallace 23, 32, 19 L. Ed 54
548, wherein this court upheld the validity of a jud
ment rendered by a Wisconsin court against an Illino
corporation after its dissolution in the state of domici
and in the course of its opinion said:

"1. It is said that the bank was dead in law, a
that as the suit was instituted against the bank b
name, no jurisdiction was acquired.

It is by no means certain that the bank had n
capacity to sustain a suit, notwithstanding the ac
ceptation of its Charter and the transfer of its pro
erty to Trustees. * * *

2. The legislature of Wisconsin had made pro
vision by special statute for a case in which a bank
whose functions had ceased, but which yet owne
property and owed debts in Wisconsin, might b
sued and the property subjected to the payment o
those debts. The constitutionality of this act is de
nied; but no provision of the constitution of Wis
consin or of the United States is pointed out whic
is opposed to such legislation. It would, on the con
trary be a strange defect in the legislative powers if
under such circumstances, a state could not fram
laws which would enable her citizens to subject th

lands of a corporation whose Charter had expired to the debts which it owed to her citizens."

At the outset, however, we are met with the question of the jurisdiction of this court to issue its writ of certiorari to the Supreme Court of Montana in view of the fact that the validity of the Montana statutory and constitutional provisions, as so interpreted by the Supreme Court of Montana, was not challenged in the State court and furthermore, petitioner failed to make any proof in the State court as to what faith and credit the Iowa judgment of dissolution had in that state.

THE COURT IS WITHOUT JURISDICTION TO ISSUE THE WRIT OF CERTIORARI.

The application for the Writ of Certiorari herein is based upon Subd. (b) of Sec. 237 Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. Sec. 344. This subdivision of the statute provides for the issuance of the Writ of Certiorari, in the court's discretion, in three classes of cases, viz., (1) where is drawn in question the validity of a treaty or statute of the United States; (2) where is drawn in question the validity of the statute of any state on the ground of its being repugnant to the treaties or laws of the United States; or (3) where any title, right, privilege or immunity is especially set up or claimed by either party under the constitution or any treaty or statute of or

commission held or authority exercised under the United States.

Obviously, the present case does not fall in the class of cases first mentioned in the statute. "The valdity of a treaty or statute of the United States" was not, in any manner, drawn in question in this case. No discussion of that clause of the statute is necessary; and we will proceed to a brief consideration of the other two clauses in Sec. 344, Title 28 U. S. C. A.

THIS IS NOT A CASE "WHERE IS DRAWN, IN QUESTION THE VALIDITY OF A STATUTE OF ANY STATE ON THE GROUND OF ITS BEING REPUGNANT TO THE CONSTITUTION, TREATIES, OR LAWS OF THE UNITED STATES."

The record shows that the decision of the Supreme Court of Montana rests entirely upon Secs. 6013 and 6059 of the Revised Codes of Montana, and Sec. 11 of Art. XV of the Constitution of Montana (R. 75-77). The effect of these statutory and constitutional provisions as interpreted by the Supreme Court of Montana is to continue in existence within the State of Montana a foreign corporation for the purpose of being sued, notwithstanding its dissolution in the jurisdiction of its domicile (R. 75-77). The interpretation thus placed upon these statutory and constitutional pro-

visions of Montana by the Supreme Court of that state are conclusive upon this court, and are not subject to review.

"The meaning attributed by the highest court of a state to a statute of the state must be accepted by the United States Supreme Court on review as though it had been specifically expressed in the statute."

Supreme Lodge etc. v. Myer, 265 U. S. 30, 44 Sup. Ct. 432, 68 L. Ed. 885.

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 50 S. Ct. 451, 74 L. Ed. 1107.

Atchison T. & S. F. Rr. Co. v. Railroad Commission of Calif., 283 U. S. 380, 51 Sup. Ct. 553, 75 L. Ed. 1128.

But the question of the validity of the state statute or constitutional provision as interpreted by the state Supreme Court, may be reviewed and determined by the Supreme Court of the United States, if the validity of the statute is drawn in question "on the ground of its being repugnant to the constitution, treaties or laws of the United States."

Sec. 344, Title 28 U. S. C. A.

But, in order to be entitled to have the question reviewed by this court, the petitioner for certiorari must show that the question of the validity of the state statute was raised in the state court "on the ground of its being repugnant to the Constitution, treaties or laws of the United States."

"In order to give the Supreme Court jurisdiction of a writ of error (or certiorari) to review a judgment which the highest court of a state has rendered in favor of the validity of a statute or an authority exercised under a state, the validity of the statute or authority must have been drawn in question on the ground of their being repugnant to the Constitution, laws or treaties of the United States. *Where no such ground has been presented to or considered by the courts of the state, the federal supreme court has no jurisdiction.*"

Green v. Frazier, 253 U. S. 233, 40 S. Ct. 499, 64 L. Ed. 878.

See other cases cited in Note 111 to Sec. 344, Title 28 U. S. C. A.

Nowhere does the record show that the validity of Secs. 6013 and 6659 Revised Codes of Montana, or Sec. 11 of Art. XV of the Constitution of Montana, was questioned in the state court "on the ground of its being repugnant to the Constitution, treaties or laws of the United States." It, therefore, follows that the "validity" of these statutory and constitutional provisions of Montana cannot now be reviewed by this court. Since the interpretation of these statutory and constitutional provisions by the Supreme Court of the State is conclusive and, as so interpreted by the Supreme Court of Montana, the foreign corporation was continued in existence for the purpose of being sued

by Montana creditors, notwithstanding dissolution in the state of domicile, and its property was subject to levy of execution, there is no jurisdiction in this case for issuance of a writ of certiorari herein. Petitioner now seeks to challenge the "validity" of these statutory and constitutional provisions upon the ground that, as interpreted by the Supreme Court of Montana, they deny full faith and credit to the judgment of the Iowa court dissolving the corporation. But since the validity of the statutes and constitutional provisions was not raised in the state court, it cannot be raised here for the first time.

Nor was the "validity" of the Iowa statute in any manner questioned in the Montana courts. It was merely construed as being inapplicable to property situated within the State of Montana and the right of litigants to prosecute actions in the Montana courts. The Supreme Court of the State of Montana said:

> "The question of continuing actions by or against a corporation after its dissolution depends upon the laws of the state in which the action is pending and a foreign statute relating thereto is of no avail (R. 76). * * * Therefore, we hold that the suit of appellants against the surety company did not abate on the entry of dissolution in Iowa, and that the judgment entered herein is good and valid" (R. 77).

The mere construction of a foreign statute without

questioning its validity does not present a Federal question under Section 344 (b), Title 28 U. S. C. A.

Glenn v. Garth, 147 U. S. 360, 13 S. Ct. 350, 37 L. Ed. 203.

Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 35 S. Ct. 37, 59 L. Ed. 220.

Moreover, the inapplicability of the Iowa statute to actions pending in the Montana court was not based upon the ground that such statute was "repugnant to the treaties or laws of the United States."

We respectfully submit that the record does not show any question reviewable under the second clause in Subd. (b) of Sec. 344, Title 28 U. S. C. A. The Petition, therefore, should be dismissed.

THE CASE IS NOT ONE "WHERE ANY TITLE, RIGHT, PRIVILEGE OR IMMUNITY IS SPECIALLY SET UP OR CLAIMED BY EITHER PARTY UNDER THE CONSTITUTION OR ANY TREATY OR STATUTE OF, OR COMMISSION HELD, OR AUTHORITY EXERCISED UNDER THE UNITED STATES."

We assume for the purpose of argument that when a party asserts that full faith and credit have not been given to a judgment rendered by a court of a sister state, he asserts a "right * * * under the Constitution" of the United States.

Westside Belt R. Co. v. Pittsburgh Construction Co., 219 U. S. 32, 31 S. Ct. 196, 55 L. Ed. 107.

But the petitioner is not in a position to complain unless (1) the right so claimed "is specially set up or claimed" in the state court, and (2) the effect of the judgment in the state where rendered was duly pleaded and proved.

We respectfully submit that petitioner failed to claim his alleged "right" in the state court in both of these respects.

(a) The Answer filed by petitioner in the state district court (R. 15-21) contains no allegation or claim that either the Iowa statute or the Iowa judgment vested in petitioner the title or right to possession of the property of Federal Surety Company situated in Montana. On the contrary, petitioner's pleading indicates that he deemed himself to be an ordinary equity Receiver, and that his rights were limited to those conferred upon him by the court appointing him and to property situated within the jurisdiction in which he was appointed. He alleged that "he is the duly appointed, qualified and acting receiver of the defendant, Federal Surety Company of Davenport, Iowa, pursuant to the order of the District Court for the State of Iowa in and for Scott County" (R. 16), and that "the said court, acting through its clerk, issued to the undersigned Letters of Receivership" (R. 18), and he prayed for the appointment of an "ancillary receiver of all the

property, assets and effects of the above named defendants, Federal Surety Company of Davenport, Iowa, situated within this jurisdiction, to care for and preserve the same until the further order of this court, with all rights and powers usually granted to ancillary Receivers in such cases including the right and power to carry into force and effect the order of the original Court or jurisdiction." (R. 20-21).

These allegations are clearly inconsistent with the claim now made that petitioner became the statutory successor of Federal Surety Company on September 25, 1931, and vested with complete title and right of possession of all of its property, wheresoever situated, including the property situated within the State of Montana.

It is apparent that if Clark on September 25, 1931, became vested with the title and right of possession to the Montana property previously belonging to Federal Surety Company, the appointment of Crichton as ancillary Receiver of "the property, assets and effects of the above named defendant, Federal Surety Company" (R. 20-21) was a useless gesture meaning absolutely nothing; because, on the theory now urged by Petitioner, the Federal Surety Company had neither property, assets nor effects on the date of Crichton's appointment since all its former property had been vested in Clark some ten months previously thereto.

Attention is also directed to the fact that nowhere

in his Answer in the State court (R. 15-21) did petitioner make any reference to the full faith and credit clause of the Constitution nor did he allege or claim that the Iowa judgments, or either of them, were entitled to full faith or credit. He did not even allege in his pleading that the Iowa judgments were "duly given and made," as required by the Montana statute when a judgment is pleaded as a basis of a right.

Sec. 9169 Revised Codes of Montana 1921.

Failure to plead the Iowa judgments in the form prescribed by the statute, rendered the pleading insufficient insofar as any rights might be based upon such foreign judgments.

Mears v. Shaw, 32 Mont. 575, 81 Pac. 338.
Henderson v. Daniels, 62 Mont. 363, 205 Pac. 964.

We respectfully submit that petitioner wholly failed to "specially set up or claim" the rights now urged in his petition for certiorari herein that "your petitioner is the successor to said corporation and as such holds *title* to all property owned by said company at the time it so ceased to exist." (Petition, p. 3).

Furthermore, since the Montana statutes (Secs. 6013 and 6659 Revised Codes of Montana) and constitutional provision (Sec. 11, Art. XV Constitution of Montana) continued the foreign corporation in existence for the purpose of being sued, and subjected its property situated in Montana to levies under executions

issued upon judgments obtained after its dissolution in the state of domicile, and the rights now claimed by petitioner, if well-founded, would necessarily mean that these statutory and constitutional provisions are invalid, a proper setting up of petitioner's alleged "rights" in the state court would involve some character of pleading that the statutory and constitutional provisions of Montana which denies such rights, were invalid. Petitioner's failure to allege or claim that the Montana statutes and constitutional provisions conflicting with his alleged rights were invalid, was a failure to "specially set up or claim" the right now asserted.

(b) The full faith and credit clause of the constitution requires only that the judgment rendered by a court of a sister state be accorded the same faith and credit that it would have in the sister state. What faith and credit it is entitled to in the state where rendered, is determined by the law of that state.

> Hanley v. Donoghue, 116 U. S. 3, 6 S. Ct. 242 29 L. Ed 535.
>
> Gasquet v. Lapeyre, 242, U. S. 673, 37 S. Ct. 165, 61 L. Ed. 367.

It is, therefore, necessary to plead and prove the law of the foreign state in order to show what faith and credit the judgment is entitled to therein. The courts of Montana do not take judicial notice of the law of Iowa.

> American Savings Bank & Trust Co. v. Chapman, 61 Mont. 408, 202 Pac. 385.

M'Bain v. N. P. Ry. Co., 52 Mont. 578, 160 Pac. 654.

And it is, therefore, necessary to plead and prove the foreign law in order to ascertain what faith and credit the alleged judgments had in the State of Iowa.

American Savings Bank & Trust Co. v. Chapman, 61 Mont. 408, 202 Pac. 385.

This court has declared the same rule in a number of cases.

Gasquet v. Lapeyre, 242 U. S. 367, 37 S. Ct. 165, 61 L. Ed. 367.

Chicago etc. Ry. Co. v. Wiggins Ferry Co., 119 U. S. 622, 7 S. Ct. 398, 30 L. Ed. 519.

Hanley v. Donohue, 116 U. S. 1, 29 L. Ed. 535.

In the case first cited, Mr. Justice Van Devanter, speaking for the court, said:

"There are several reasons why this assignment affords no basis for a review here, but the statement of one will suffice. What the Constitution and the congressional enactment require is that a judgment of a court of one state, if founded upon adequate jurisdiction of the parties and subject-matter, shall be given the same faith and credit in a court of another state that it has by law or usage in the courts of the state of its rendition. This pre-supposes that the law or usage in the latter state will be brought to the attention of the court in the other state by appropriate allegation and proof, or in some other recognized mode; for the courts of one state are not

presumed to know, and therefore not bound to take judicial notice of, the laws or usage of another state (citing cases). *Here the law or usage in Tennessee, where the judgment was rendered, was not in any way brought to the attention of the Louisiana court, and therefore an essential step in invoking the full faith and credit clause was omitted.* In this situation the claim that the Louisiana court refused to give effect to that clause is so devoid of merit as to be frivolous."

Gasquet v. Lapeyre, 242 U. S. 367, 37 S. Ct. 165, 61 L. Ed. 367.

There is nothing in the record to show whether under the Iowa law the Iowa judgments are final or interlocutory merely. It is only a final judgment that is entitled to full faith and credit.

Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. Ed. 687.

See also:

Hoch v. Bryan, 230 N. W. 823, 180 Minn. 298.

Wolf v. Chicago M. St. P. & P. R. Co., 230 N. W. 826, 180 Minn. 310.

The record affirmatively shows that the Iowa court retained jurisdiction to make "further directions, orders or decrees as may be necessary or proper" (R. 26); and the exparte order made by the Iowa court on December 22, 1931, on application of the Receiver "for instructions and orders concerning his duty" (R. 26) shows that the court apparently felt at liberty to modify or

enlarge its previous decree (R. 26-31). If the Iowa court had jurisdiction on December 22, 1931, to modify its previous decree, it doubtless has the same jurisdiction still, and neither the decree of September 25, 1931 (R. 21-26), nor the order made December 22, 1931 (R. 26-31), can be deemed final.

Under the Montana statute an action is deemed pending from the time of its commencement until final determination on appeal, or until the time for appeal has passed.

> "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."
>
> Sec. 9821 Revised Codes of Montana 1921.
>
> Peterson v. City of Butte, 44 Mont. 129, 120 Pac. 231.

A judgment rendered in this state does not become final until determined on appeal, or until the time for appeal has passed.

> Noe v. Matlock, 64 Mont. 35, 208 Pac. 591.

There is nothing in the record to indicate what the period for appeal from the Iowa judgment under the Iowa law may be, nor is there anything to show whether or not an appeal has been taken.

Even if the Decree of September 25, 1931, be deemed a judgment for the immediate dissolution of the corporation (and we respectfully submit that it is not a

judgment of immediate dissolution), the corporation nevertheless had the right to appeal therefrom; and the decree would not be effective while the appeal was pending.

> State ex rel Attorney General v. Fidelity Loan & Trust Co., 113 Iowa 439, 85 N. W. 638.

And even without appeal being taken, the judgment would not be effective until the time for appeal expired, unless the corporation acquiesced in same.

> State ex rel Attorney General v. Fidelity Loan & Trust Co., 113 Iowa 439, 85 N. W. 638.

No proof was introduced in the trial court to show that appeal had not been taken, or that the time for taking appeal had expired.

We respectfully submit that the record does not show that either the decree of September 25, 1931 (R. 21-26), or the order of December 22, 1931 (R. 26-31), had become final or conclusive under the Iowa law.

Attention is also directed to the fact that the Iowa decree of September 25, 1931 (R. 21-26), was rendered in a default proceeding (R. 17), and that the only service upon the defendant surety company was an order to show cause "why its *business* should not be forthwith dissolved, and a receiver appointed to wind up its affairs" (R. 17). We submit that under an order to show cause of that character, the Iowa court had no jurisdiction to enter a decree *dissolving* the corporation, and that if the decree may be interpreted to be a decree

for the *dissolution* of the corporation, it is not responsive to the issue presented in the order to show cause and to that extent, it is entitled to no faith or credit. In discussing this point in the case of Reynolds v. Stockton, 140 U. S. 264, 11 S. Ct. 773, 35 L. Ed. 464, Mr. Justice Brewer said:

"Under that section the full faith and credit demanded is only that faith and credit which the judicial proceedings had in the other State in and of themselves require. It does not demand that a judgment rendered in a court of one State, without the jurisdiction of the person, shall be recognized by the courts of another State as valid, or that a judgment rendered by a court which has jurisdiction of the person, *but which is in no way responsive to the issues tendered by the pleadings* and is rendered in the actual absence of the defendant, must be recognized as valid in the courts of any other state."

Reynolds v. Stockton, 140 U. S. 264, 11 S. Ct. 773, 35 L. Ed. 464.

See also: 12 R. C. L. 114.

Folger v. Columbia Ins. Co., 99 Mass. 267, 96 Am. Dec. 474.

Olds v. City Trust Safe Deposit Co., 185 Mass. 500, 70 N. E. 1022, 102 A. S. R. 576.

"The final absolute order should be no broader than the rule or order to show cause."

15 Encyc. Plead. & Prac., 372.

Furthermore, the decree rendered by the Iowa court September 25, 1931, did not purport to *presently* dissolve the Federal Surety Company. The language of the judgment is that "defendant Federal Surety Company *shall be dissolved*, and its effects distributed" (R. 22). The auxiliary words "shall be" are the future tense of the verb and indicate action or effect to be taken or had in the future. The use of these words negatives any *present* dissolution of the corporation. It would be as reasonable to say that the decree effected an immediate distribution of assets of Federal Surety Company to creditors, as it is to claim that the decree effected an immediate dissolution of the corporation. The language used shows that the decree contemplated that the corporate effects would be "distributed" and the corporation would be "dissolved" at some future date. Nor can the effect of that decree be enlarged or extended by the ex parte order made December 22, 1931 (R. 26-31). No notice of any character was given of the receiver's application "for instructions and orders concerning his duty" (R. 26), and it is little short of absurd to say that the rights of respondents in this case or the title to property situated in Montana could be affected by that order.

> "The constitutional requirement that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state is necessarily to be interpreted in connection with

other provisions of the Constitution, *and therefore no state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law.*"

Old Wayne Mutual L. Assn. v. McDonough, 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345.

See also:

Watmore v. Karrick, 205 U. S. 141, 27 S. Ct. 434, 51 L. Ed. 745.

Since petitioner did not attempt to plead or prove what "faith and credit" the Iowa judgments were entitled to in the state of Iowa, he is not in a position to complain that the Iowa judgments were not accorded "full faith and credit" by the Supreme Court of Montana.

Nor can it be claimed that the Montana court failed to give full faith and credit to the Iowa *statute* relating to the winding up of insurance and surety companies. That statute does not of itself purport to vest in the state Insurance Commissioner the title to property of an insolvent Surety Company, even if such property is situated within the State. Still less, can it be claimed that the *statute* purports to transfer to the Insurance Commissioner property not situated within the State of Iowa. The interpretation placed upon this statute by the Supreme Court of Montana without questioning its validity and the Court's conclusion that

it does not have the effect of transferring to the Iowa Insurance Commissioner property of the insolvent corporation situated within the State of Montana, nor control the prosecution of actions in the Montana courts, is not a denial of the full faith and credit required by Sec. 1, Art. IV of the Constitution of the United States.

Allen v. Allegheny Co., 196 U. S. 458, 25 S. Ct. 311, 49 L. Ed. 551.

Glenn v. Garth, 147 U. S. 360.

Western Life Indemnity Co. v. Rupp, 235 U. S. 261.

In the case first cited, this court said in part:

"In several cases we have held that the construction of a statute of another state and its operation elsewhere did not necessarily involve a federal question. (citing cases). We have repeatedly held that the mere construction by a state court of a statute of another state, without questioning its validity, does not with possibly some exceptions, deny it the full faith and credit demanded by the statute in order to give this court jurisdiction."

Allen v. Allegheny Co., 196 U. S. 458, 25 S. Ct. 311, 49 L. Ed. 551.

Nor can the petitioner complain that full faith and credit was not accorded the Iowa judgment without allegation and proof in the state court that under the Iowa law these judgments were final, and not merely interlocutory.

Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. Ed. 687.

We respectfully submit that the record does not show that the petitioner was improperly denied any right under the Constitution of the United States, which was "specially set up or claimed by" him in the state court.

THE CASE DOES NOT PRESENT ANY FEDERAL QUESTION THAT IS WORTHY OF REVIEW BY THIS COURT.

Petitioner's Complaint herein is based upon the following propositions, both of which we submit are erroneous:

(1). That the Iowa proceedings dissolved the Federal Surety Company, and that the necessary effect thereof was to abate the actions pending against it in the Montana courts, and prohibit the Montana courts and Montana litigants from proceeding to judgment against it, notwithstanding the fact that the Montana constitution and statutes continued the corporation in existence for the purpose of being sued;

(2) That the Iowa proceedings had the effect of transferring title to property situated in Montana, notwithstanding the provisions of the Montana law to the contrary.

(1)

A corporation is a mere legal fiction, and exists only in contemplation of law. Chief Justice Marshall, fol-

lowing Lord Coke, said:

"A corporation is an artificial being, invisible, intangible, *and existing only in contemplation of law.*"

Dartmouth College v. Woodward, 4 Wheat (U. S.) 518, 4 L. Ed. 629.

1 Thompson on Corporations, Sec. 3.

Since a corporation is a legal entity "existing only in contemplation of law," it follows that whatever the Montana law contemplates to be a legal entity is in fact such. It is the contemplation of law that makes the legal entity or corporation and a state is at liberty to regard any individual, officer, group of persons or associations as a corporation, as it sees fit. Under the Montana constitution and statutes a foreign corporation coming into the state to do business, is contemplated to continue a corporation notwithstanding its dissolution in the state of domicile, and its property within the State of Montana may be charged with the payment of debts contracted in the transaction of its Montana business. No authority can be found which denies to a state this power to impose, upon a foreign corporation entering the state for the transaction of business, such conditions as it sees fit to impose, and to deem the corporation continued in existence for the purpose of enforcing payment of its obligations incurred in the transaction of its business within the state, notwithstanding proceedings for dissolution in other jurisdictions.

The question is fully discussed by the Supreme Court

of Iowa, in:

Schloss v. Metropolitan Surety Co., 149 Iowa 382, 128 N. W. 384.

To the same effect see:

Norris v. Lloyd, 183 Iowa 1056, 168 N. W. 557.

U. S. Truck Co. v. Penn Surety Co., 243 N. W. 311.

The rule applicable to foreign corporations, is stated in a general work as follows:

"The question of continuing or reviving actions by or against a corporation after its dissolution depends upon the laws of the state in which the action is pending, and a foreign statute relating thereto is of no avail."

1 C. J. 137.

"Domestic statutes continuing the existence of dissolved foreign corporations for the purpose of prosecuting and defending actions after they have been dissolved are effective to render valid judgments obtained in the state, so far as property in the state belonging to the foreign corporation is concerned."

14-A C. J. 1353.

In the case of U. S. Truck Co. vs. Penn. Surety Co., 259 Mich., 242, 243 N. W. 311, the Supreme Court of Michigan held that the decree of dissolution of a Pennsylvania corporation rendered by a Pennsylvania court, abated an action commenced in the State court of Michigan on the date of such dissolution; but the decision

was based strictly upon the ground that the Michigan statutes did not purport to continue a foreign corporation in existence for the purpose of suit and the court clearly indicated that if there were such statutory provisions in the State of Michigan they would be valid and the case could be prosecuted against the foreign corporation notwithstanding its dissolution in the jurisdiction of domicile. The court said:

"The statutes of this state recognize the finality of dissolution by providing for continuance of domestic corporations for a term of years for the purpose of certain actions and directing the manner of service. These statutes are not made to apply to foreign corporations either by language or as a condition of administration of the latter to do business in this state. *Perhaps our legislature should extend them to foreign corporations as has been done in other states.*" U. S. Truck Co. vs. Penn. Surety Co. 243 N. W. 311, 259 Michigan 242.

Attention is again directed to the language employed by this court in McGoon vs. Scales, supra, where this court declared the propriety and validity of such legislation and said:

"It would, on the contrary, be a strange defect in the legislative power if, under such circumstances, a state could not frame laws which would enable her citizens to subject the lands of a corporation whose Charter had expired to the debts which it owed to

her citizens." McGoon vs. Scales 9 Wallace 23, 19 Law Edition 545.

To the same effect see:

Life Assn. of America vs. Fassett, 102 Ill. 315.

Winger vs. Hutchinson 83 Ill. App. 675, 183 Ill. 606 56 N. E. 388, 75 A. S. R. 133; Castle vs. Acrogen Coal Co. 145 Kentucky 591, 140 S. W. 1034,

Stetson v. New Orleans City Bank, 2 Oh. St, 167, 12 Oh. St. 577,

Sturgis v. Vandervelt, 73 N. Y. 384,

Simmott v. Hamman, 141 N. Y. Supp. 505,

Rodgers v. Adriatic Fire Ins. Co., 148 N. Y. 34, 42 N. E. 515.

We respectfully submit that the Montana constitutional and statutory provisions continuing the foreign corporation in existence for the purpose of being sued, and subjecting its property situated within the State of Montana to levy of executions issued on such judgments, were within the power of the state to adopt and enact, and that the Iowa statutes or proceedings in the Iowa courts cannot operate to annul or defeat the Montana law in that regard.

(2)

THE IOWA COURT HAD NO JURISDICTION TO CONTROL THE DEVOLUTION OF PROPERTY SITUATED WITHIN THE STATE OF MONTANA, NOR THE RIGHT OF MONTANA

LITIGANTS TO PROSECUTE ACTIONS I
THE MONTANA COURT.

The devolution of property situated within the Sta
of Montana is governed exclusively by Montana la
The rule is stated in the general work as follows:

"The dominion of a state over personal proper
within its borders is complete and its right to reg
late its transfer and subject it to process and exec
tion in its own way and by its own laws is unque
tioned, though by a legal fiction generally recogniz
by comity personal property is supposed to adhere
the person of the owner and is usually considered
having no situs other than his domicile."

5 R. C. L. 927, and cases cited.

"All real or immovable property is exclusively su
ject to the laws of the country within which it is s
uated, and no interference with it by any other so
ereignty can be permitted. It, therefore, follows th
all matters concerning the title and disposition of re
property are determined by what is known as the l
loci rei sitae, which can alone prescribe the mode
which a title to it can pass from one person to a
other, or an interest therein of any sort can be gain
or lost; *and this is true* in the case of an attempt
transfer whether it be voluntary or involuntary."

5 R. C. L. p. 925, and cases cited.

In accordance with the above principles, it has be

held by the Supreme Court of the United States:

"That a conveyance under a state insolvent law operates only upon property within the territory of that state, and that with respect to property in other states, it is given only such effect as the laws of such state permit, and that, in general, it must give way to the claims of creditors pursuing their remedies there. It passes no title to real estate situated in another state. *Nor, as to personal property, will the title acquired by it prevail against the rights of attaching creditors under laws of the state where the property is actually situated.*"

Security Trust Co. v. Dodd et al., 173 U. S. 624, 19 S. Ct. 545, 43 L. Ed. 835.

See also: 5 R. C. L. 1026, Sec. 118, and cases cited.

Maconchy v. Delehanty, 14 Ariz. 366, 95 Pac. 109, 20 Ann. Cas. 1038, 17 L. R. A. (ns) 173, and Note.

In R. C. L. above cited, the rule is stated as follows:

"Bankruptcy or insolvency proceedings in one state have no effect of their own force on property situated in another state, and the receiver or assignee may not claim such property as a matter of right."

5 R. C. L. 1026, and cases cited.

In Clark v. Clark, 178 U. S. 186, 44 L. Ed 1028, 20 S. Ct. 873, the question was as to the effect to be given to a judgment rendered in the Supreme Court of South Carolina in the courts of the State of Connecticut re-

specting real estate situated in Connecticut, in regard to which the South Carolina court had held that a certain Will had worked an equitable conversion into personalty. This judgment the Connecticut court refused to follow. In upholding the position of the Connecticut court, this court said:

> "The proposition relied on therefore is this—although the court of last resort of Connecticut (declaring the law of the state) has held that the real estate in question had not become personal property by virtue of the Will of Mrs. Clark, nevertheless it should have decided to the contrary, because South Carolina had so decreed. This, however, is but to argue that the law declared by the South Carolina court should control the passage by Will of land in Connecticut, and therefore is equivalent to denying the correctness of the elementary proposition that the law of Connecticut where the real estate is situated, governed in this case."

In Fall v. Eastin, 215 U. S. 1, 30 S. Ct. 3, 54 L. Ed. 65, this court held that a deed made by a master by order of the court in the State of Washington, in execution of a decree, where the court had jurisdiction of the parties, did not have any efficacy as to the title of real estate beyond the jurisdiction of the court. Therein the court announced the general rule that the disposition of real property, whether by deed or descent or otherwise, must be governed by the law of the state where

the property is situated, and said:

"This doctrine is entirely consistent with the provision of the Constitution of the United States which requires a judgment in any state to be given full faith and credit in the courts of every other state. *This provision does not extend the jurisdiction of the courts of one state to property situated in another, but only makes the judgment rendered conclusive on the merits of the claim on the subject matter of the suit.*"

To the same effect see:

Schloss v. Metropolitan Surety Co., 149 Iowa 382, 128 N. W. 384;

U. S. Truck Co. v. Penn Surety Co., 259 Mich. 242, 243 N. W. 311.

Nor did the Iowa court have any jurisdiction or power to restrict the right of Montana litigants to prosecute actions in the Montana courts. Respondents herein had instituted their action against the Federal Surety Company January 15, 1925 (R. 45), more than six years prior to the commencement of the proceedings in the Iowa court. Their right to prosecute that action to judgment could not be restricted by decrees entered or orders made by the Iowa court in a proceeding to which they were not parties. The courts of one state are not required by Sec. 1 of Art. IV of the United States Constitution to give full faith and credit to a judgment obtained in the courts of another state against

a person who was not a party to the suit.

> Engelhard v. Schoeder (CCA N. J.), 278 F. 341, affirmed 42 S. Ct. 382, 258 U. S. 640, 66 L. Ed. 789.
>
> Bagley v. General Fire Extinguisher Co., 212 U. S. 477, 29 S. Ct. 341, 53 L. Ed 605.
>
> Evans v. Illinois Surety Co., 140 N. E. 802, 319 Ill. 105.

The respondents herein were not parties to the proceeding against Federal Surety Company in the Iowa court, and had no notice thereof, and could not have appeared in that action and defended, even if they had been notified and desired to defend. It is still more obvious that the order entered by the Iowa court December 22, 1931 is not, in any manner, binding upon respondents, and could not in any manner affect their rights. That order (R. 26-31) is based upon the application of the Receiver "for instructions and orders concerning his duty" (R. 26). There was no adversary party and there was no notice given to the respondents or to any other person. The application of the Receiver "for instructions" did not present, and could not present, any issue of either law or fact. Any attempt upon the part of the District Court in that ex parte proceeding to adjudge and determine the rights of persons not parties to it was clearly beyond the jurisdiction of the court and outside of any issues presented by the application. An essential element of a judgment entitled to full faith and credit under the Constitution of the

United States is that it must have been obtained according to due process of law.

"No judgment of a court is due process of law if rendered without jurisdiction in the court or without notice to the party."

Scott v. McNeal, 154 U. S. 34, 46, 38 L. Ed. 896, 14 S. Ct. 1108.

"The constitutional requirement that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state is necessarily to be interpreted in connection with other provisions of the constitution, and therefore no state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in due process of law enjoined by the fundamental law."

Old Wayne Mutual Assn. v. McDonough, 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345.

"It is a rule as old as the law and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant until he has been duly cited to appear *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression and never can be upheld where justice is justly administered."

Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959.

See also:

Wetmore v. Karrick, 205 U. S. 141, 27 S. Ct. 434, 51 L. Ed. 745.

Schloss v. Metropolitan Ins. Co., 149 Iowa 332, 128 N. W. 384.

U. S. Truck Co. v. Penn Surety Co., 259 Mich. 242, 243 N. W. 311.

The Iowa decrees lacked every element of due process of law insofar as they attempted to deprive respondents herein of their right to proceed with the prosecution of suits previously commenced in the Montana courts.

A STATUTORY RECEIVER HAS NO EXTRA-TERRITORIAL POWER UNLESS THERE IS A STATUTE VESTING HIM WITH TITLE TO THE PROPERTY, WHICH IOWA DOES NOT HAVE.

Counsel have cited, as an alleged construction of the operation of the Iowa Code provision applicable, State ex rel Attorney General v. Fidelity Loan & Trust Company, 85 N. W. 638, involving a decree appointing a receiver and dissolving that corporation. There, the decree ordered that "the Fidelity Loan & Trust Company *be and is hereby dissolved.*"

However, to give Clark the powers and rights contended for by petitioner, viz., that he shall be recognized in every state, there is a condition precedent, which the United States Supreme Court has held necessary, and

that is that the statute, itself in order to become a part of the charter of the corporation, must provide in direct terms that this statutory officer shall *become vested with the title to all* corporate assets.

In other words, Respondents are invoking the doctrine of Relf v. Rundle, 103 U. S. 222, 26 L. Ed. 357, and other cases based upon statutes *expressly so declaring*, and not upon statutes such as the one in question. (Tr. p. 31, Lines 26-29; Tr. p. 32, Lines 1-28).

Where such statutes as the Iowa statute are involved, the same court, in a large number of cases, and cases later than Relf v. Rundle, or any of the cases cited, has held that this power and right of the statutory Receiver does not exist and need not be recognized.

Thus, in Sterrett v. Second National Bank, 248 U. S. 73, 63 L. Ed. 135, the Court, in distinguishing Relf v. Rundle, and other cases relied on by Respondents, says:

> "Since the decision of this court in Booth v. Clark, 17 How. 322, 15 L. Ed. 164, it is the settled doctrine in Federal jurisprudence that a chancery receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property therein situated. The functions and authority of such receiver are confined to the jurisdiction in which he was appointed. The reasons for this rule were fully discussed in Booth v. Clark, and have been reiterated in later decisions of this court. Hale v. Allinson, 188 U. S. 56, 47 L. Ed. 380, 23 Sup. Ct. Rep. 244; Great

Western Min. & Mfg. Co. v. Harris, 198 U. S. 561, 575, 577, 49 L. Ed. 1163, 1168, 1169, 25 Sup. Ct. Rep. 770; Keatley v. Furey, 226 U. S. 309, 403, 57 L. Ed. 273, 275, 33 Sup. Ct. Rep. 121. This practice has become general in the courts of the United States and is a system well understood and followed. It permits an application for an ancillary receivership in a foreign jurisdiction where the local assets may be recovered, and, if necessary, administered. The system established in Booth v. Clark has become the settled law of the Federal courts, and if the powers of chancery *receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation, and not from judicial action.* Great Western Min. & Mfg. Co. v. Harris, 198 U. S. 577, 49 L. Ed. 1169, 25 Sup. Ct. Rep. 770.

"Counsel for petitioner insists that the case is not ruled by the doctrine of Booth v. Clark, and that under the Alabama statutes and the decisions of the supreme court of that state, *the title to the property of the Trust Company is vested in the receiver in such wise that he is authorized to sue for its recovery in the courts of a foreign jurisdiction.*

* * * * *

"The statutes do not undertake to vest in the receiver an estate in the property to be administered

for the benefit of creditors, as was the case in Bernheimer v. Converse, 206 U. S. 516, 534, 51 L. Ed. 1163, 1170, 27 Sup. Ct. Rep. 755, and Converse v. Hamilton, 224 U. S. 243, 257, 56 L. Ed. 749, 754, 32 Sup. Ct. Rep. 415, Ann. Cas. 1913D, 1292, in which the right to sue in the courts of a foreign jurisdiction was sustained."

The court will find the Alabama statute, therein construed, just as broad a statute as the Iowa statute.

See also:

Hale v. Allinson, 188 U. S. 56, 47 L. Ed. 380;

Great Western Min. & Mfg. Co. v. Harris 198 U. S. 561, 49 L. 3d 1163;

Keatley v. Furey, 226 U. S. 309, 57 L. Ed. 273;

Lyon Bonding Co. v. Koratz, 280 Fed. 532-538, and cases cited therein.

The cases cited by Petitioner have either been distinguished by the courts or are distinguishable.

Bernheimer v. Converse and Converse v. Hamilton, the two United States Supreme Court decisions, are distinguished in Sterrett v. Second National Bank, 63 L. Ed 135, as the quotation therefrom shows.

The Iowa doctrine on this subject of discussion is Schloss v. Metropolitan Surety Co., 128 N. W. 382, 149 Iowa 382, distinguishing Relf vs. Rundle and, because the Receiver was not vested by statute with the title, the Court, in that case, said:

"It must be borne in mind that the Receiver here

defending is simply a receiver of an insolvent company who is, by the corporation laws of New York, authorized to collect the debts, preserve the property and distribute the assets of the company among its creditors, we fail to see how any receiver thus provided for can, in this state, as against the established rule of our law, take the company's assets found in this state, and seized for the plaintiff in an attachment proceeding, out of our state, without satisfying the valid claim of the attaching creditor, and compel him to resort to the courts of New York for the purpose of securing payment of such claim."

And in the same decision, the Iowa Court distinguishes Parsons v. Charter Oak Ins. Co., 31 Fed 305, by saying:

"*Without acceding to the soundness of the reasoning employed* in deciding that case, it is sufficient to say that the case before us is not analogous, for plaintiff's rights as against this defendant company were determined by contract, and contract alone, and those substantive rights are not to be affected, as we think, by statutory provisions of New York with reference to the method in which the company may be wound up."

Mere receivership, it has uniformly been held, is not sufficient to authorize the receiver to go into foreign jurisdictions and contest with local creditors.

Booth v. Clark, 17 How. (U. S.) 322, 15 L. Ed. 164;

Homer v. Barr Pumping Engine Co. 180 Mass. 163, 91 Am. St. Rep. 269, 61 N. E. 883;

Re: Benedict, 140 Fed. 55;

In Re: Dunseath & Son Co., 168 Fed. 973;

Neither does a receiver become vested with any title or estate to the property.

Thompson v. Phoenix Ins. Co., 136 U. S. 287, 34 L. Ed. 408;

State v. Yellowstone County, 50 Mont. 259, 146 Pac. 539;

53 C. J. 96, Sec. 119;

As we have seen, to have any effect in this case, the authority must come from a statute and not from a judicial decree, it is only of academic importance as to where the title rests after a decree of dissolution.

An examination of the Iowa decree entered September 25, 1931 (Record 21 to 26), shows clearly that Clark is a mere equity receiver and derives his entire power from the decree of the court and the court remains in full charge of the administration of the estate. The receiver was required "to file an inventory of all property" (Record 23). He was directed "to sell all of the property and assets" (Record 24) "at public auction" (Record 25) but "no sale by the receiver of the properties of defendant company shall be valid until the receiver shall make report thereof and file such report with the clerk of this court and present such

report for approval and confirmation to some Judge this court (Record 25). This provision of the dec negatives petitioner's claim that he was vested w title, because a party vested with title would be a to transfer same by his own account. He was requir "to file a bond in this court as receiver (Record 2 * * * whereupon rights of receivership shall issue him" (Record 26). All of these provisions indic that the petitioner herein was a mere equity receiv entirely controlled by the court, deriving all of powers from the decree of the court, and none of powers from the statute. The statute further confir this conclusion because it contains absolutely no dir tions as to how the receiver shall proceed to wind the corporation affairs and does not in any man purport to define either his powers or his duties. is inconceivable that the legislature of the State Iowa would vest the title of the insolvent corporati in the receiver and leave him wholly unguided a uncontrolled by any statutory provisions as to his dut or manner of performing them.

We respectfully submit that neither the Iowa stat nor the Iowa decree of September 25, 1931, vest petitioner with any greater power or authority th that possessed by the ordinary equity receiver. As the order of December 22, 1931, we have heretof shown that the court had no jurisdiction to enter a judgment or order in that proceeding which would

any manner affect the rights of third parties.

NONE OF THE CASES CITED BY PETITIONER ARE IN POINT AND ARE EASILY DISTINGUISHED.

All of the cases cited by petitioner in support of his petition are distinguished from the case at bar in this, that in none of them was there a statutory provision in the state of the former which expressly or by judicial interpretation continued the foreign corporation in existence for the purpose of being sued by local creditors. For illustration, Oklahoma Natural Gas Co. vs. Oklahoma, 273 U. S. 257, extensively quoted from by petitioner is far from holding that an Oklahoma survival statute would have been invalid. The court examined that statute and found it inapplicable because it applied only to corporations dissolved by action of court and in commenting upon the fact, said:

> "There is nothing to indicate why the company was dissolved. We may assume but we do not know, that it was in anticipation of its dissolution by force of law."

It seems manifest that had Oklahoma an applicable statute the case would have been ruled in harmony with the other American authorities cited and quoted herein.

We therefore respectfully submit that insofar as this case involves any federal question, the decision of the